

**SENATE COMMITTEE – INDEPENDENT CONTRACTORS ACT  
SEN TROETH, KEN PHILLIPS, SENATORS OF COMMITTEE  
PARLIAMENT HOUSE CANBERRA**

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**Extracts from the Publicly Available Transcripts,  
4 August 2006**

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Sen TROETH: (Lib)                      **Welcome the witness from the Independent Contractors of Australia. For the Hansard record, would you please state your full name and the capacity in which you appear.**

Ken PHILLIPS:                      **Kenneth Norman Phillips, executive director of Independent Contractors of Australia.**

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PHILLIPS:                      **Thank you. Senators, thanks for the opportunity to participate in this inquiry. Independent Contractors of Australia is a strong and vocal supporter of the proposed Independent Contractors Act. We have a number of suggestions for enhancements to the Bill. Our main points are as follows:-**

**The principles of the Bill are clearly in accord with the latest International Labour Organisation labour standards, established by the**

**ILO in June, 2006. The 2006 ILO recommendations specifically covers the issues addressed in the Independent Contractors Bill. In substantially being in accord with the ILO recommendation, the Bill is probably a world first. There is a direct fit between the Bill and the 2006 ILO recommendation.**

**The ILO standard holds that employment law should not interfere in the commercial contract. This is historically significant for the ILO. The Bill achieves conformity with this ILO standard and overrides state laws during conflict with the ILO standard. The use of common law as the definition in the Bill is consistent with the ILO recommendation. In 2005 the first ever ILO international survey reported that dependent contractors are employees, and that independent workers are independent contractors. The common law was found to be an established process for identifying the differences. The Bill is a world first in applying specific sanctions against sham or disguised employment. This is a primary objective of the ILO recommendation. The Bill's arrangements in this respect are extremely strong. Some submissions to you have suggested too strong.**

**The purpose of the Bill is narrow. It is specifically aimed at processes to identify and make solid the difference between the employment contract and the commercial contract. Its intent is little more than this. It is not a catch all Bill to resolve all unaddressed policy issues concerning independent contractors. ICA considers that once the Bill is law, more needs to be done, starting with the Commonwealth in relation to**

**superannuation, the states in the Commonwealth in relation to workers compensation and OHS.**

**The exclusion of owner/drivers in Victoria and New South Wales from the Bill is not in accord with the ILO recommendation. Independent Contractors of Australia is opposed to this exclusion. In relation to Victoria, the Victorian Owner/Drivers Act has provisions which create a process to facilitate price controls under commercial contracts for owner/drivers. Further, the Act removes itself from the Trade Practices Act, proof in our view that the price control intent of the Victorian Act. ICA opposes these price control processes. The Independent Contractor Bill should immediately override the Victorian Owner/Drivers Act.**

**In relation to New South Wales, chapter 6 of the New South Wales IR Act declares owner/drivers to be employees, thus creating employment style control over owner/drivers' commercial contracts. This is not in accord with the ILO 2006 recommendation. The New South Wales provisions have been in place for some thirty years, and did have industry support, most notably from the New South Wales Road Transport Association, but they have changed their position. The evidence is in that the New South Wales owner/driver laws do not effect road safety. It transpires that the New South Wales owner/driver provisions do not legally apply to interstate or intrastate long haul. The New South Wales RTA submission presents data that heavy vehicle fatalities are marginally higher in New South Wales than for Australia.**

**The use of road safety arguments to justify the New South Wales owner/driver laws is not valid. There is no provable link between the IR laws and the incidents of road accidents. The New South Wales owner/driver laws should be overridden by the Bill. However, we recommend a phase process over say two years, to give commercial arrangements time to adjust.**

**ICA supports the sham contract provisions in the Bill, with modifications. In relation to the presumption of guilt, we are troubled. The justifications in the explanatory memorandum are puzzling. We ask that your Committee carefully consider the justice issues in relation to presumption of guilt. Unions should not be able to undertake a sham contract prosecution. The allegation of a sham contract is extremely serious, amounting to an allegation of fraud. Only an appropriate government authority should undertake such a prosecution.**

**The Bill allows for independent contractors to be – other independent contractors to be excluded from the Act via regulations. This regulation power should be removed. If additional exclusions were proposed, this should only occur via legislative amendment to ensure full public debate.**

**In relation to other submissions to the inquiry, I draw your attention to the submission by the Post Office Agents Association Limited. This is an excellent case study which demonstrates all the policy dilemmas and resolutions. The poll represents five and a half thousand male delivery**

contractors who all have one client, Australia Post. The poll describes how some of the contracts and some Australia Post managers' behaviours could possibly constitute exploitation. The poll does not suggest IR style regulations to resolve the problems. The answers are far more simple and practical. They ask for small claims type dispute resolution processes, similar to that that operate in other parts of Australia Post. They say this would resolve the majority of problems.

ICA strongly supports this approach. Most problems independent contractors experience relate to non payment of comparatively small amounts. Small claims process is similar to consumer affairs processes, to fix a huge quantity of such problems. To this purpose, ICA requests the Committee consider extending to all independent contractors the small claims processes made available to clothing out workers under the Independent Contractors Bill. ICA would not, however, want such a process to remove independent contractors' access to the state trader-to-trader small claims processes. Both jurisdictions should be available to independent contractors. To this purpose, we ask you to consider Part 5 with the Victorian Government's submission. Their submission expresses concern that the Victorian trader-to-trader small claims provisions could be nullified by the existing drafting of the Independent Contractors Act, or Bill. We do not feel qualified to judge the legal accuracy of the views put, but we ask that this issue be looked at carefully to ensure that non-IR type small claims processes for independent contractors are secure. Thank you.

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Sen CAMPBELL: (ALP) **Mr Phillips, thank you for your material on your organisation. You say that your organisation was formed what, around 2001?**

**PHILLIPS: Yes.**

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CAMPBELL (ALP) **What information do require of the membership, when they seek membership, fill in a membership?**

PHILLIPS: **Oh, they put in an application, um, we have a look at it, give them a phone call, have a chat, um, there hasn't been an application we've rejected so far.**

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PHILLIPS: **We, um, ah... We look at what they've sent to us and take it on face value.**

**CAMPBELL:** But Mr Phillips, you come here, along here, present us with a submission, purporting to represent Independent Contractors of Australia, yet you can't tell me, and you've only got two hundred members, you can't tell me which of those voting members are owner/drivers, what category of independent contractor they fall into. How can you expect us to legitimately accept what you say to this Committee.

**PHILLIPS:** Well, that's for you to make your decision, Senator.

**CAMPBELL:** Well, you're the executive director, Mr Phillips, is that correct? How were you appointed?

**PHILLIPS:** It's a volunteer position.

**CAMPBELL:** So you're not paid?

**PHILLIPS:** No.

**CAMPBELL:** It's honorary, you've held a -

**PHILLIPS:** Sorry?

**CAMPBELL:** Are you paid a stipend, is it an honorary

**position?**

**PHILLIPS:** Um, no, I endeavour to get my costs covered.

**CAMPBELL:** You endeavour to get your costs covered.

**PHILLIPS:** My costs being the expense of coming up here and that sort of thing.

**CAMPBELL:** Right, yeah, I understand what you mean by your costs. And are you engaged in employment elsewhere?

**PHILLIPS:** I am engaged as an independent contractor.

**CAMPBELL:** As an independent contractor?

**PHILLIPS:** Yes.

**CAMPBELL:** Who with?

**PHILLIPS:** A wide range, I had income from probably twenty sources last year, ah, writing articles for newspapers, um, I do consultative work for companies on their OHS issues, um, looking at, ah, whether or not their, um, procedures fit with, with proper requirements, ah, I consult to them on their contractual arrangements, are they conforming with the proper contractual arrangements, a whole



**wide range of activities.**

**CAMPBELL:**                   **So you sell your services as a consultant?**

**PHILLIPS:**                   **Absolutely.**

**CAMPBELL:**                   **In the industrial relations field, human resources field?**

**PHILLIPS:**                   **No, I refer to it as the non-industrial relations.**

**CAMPBELL:**                   **In the non-industrial relations.**

**PHILLIPS:**                   **Non-industrial relations, yeah. I have a commercial focus.**

**CAMPBELL:**                   **Right. What qualifications do you – what are your qualifications?**

**PHILLIPS:**                   **I'm a, ah, I have a, um, Diploma of Teaching, Primary, and a Bachelor of Arts.**

**CAMPBELL:**                   **Right. Now, you say your organisation, you say your organisation has a constitution.**

**PHILLIPS:**                   **Yes.**

**CAMPBELL:** Does that provide for a committee of management?

**PHILLIPS:** Yes.

**CAMPBELL:** How many members on the committee of management.

**PHILLIPS:** Twelve.

**CAMPBELL:** Twelve? How are they selected?

**PHILLIPS:** From the vote of the – they nominate, like any normal committee, they nominate, and, ah, there's an election each year.

**CAMPBELL:** Who conducts the ballot?

**PHILLIPS:** We do.

**CAMPBELL:** Yourself, you do?

**PHILLIPS:** Yes, we follow the procedures required under the South Australian Incorporations Act, which we are registered under, and the procedures that we follow are from the Constitution that

**is recommended under that Act.**

**CAMPBELL: Right. And you act as the returning officer?**

**PHILLIPS: No, no, we will get someone, one of the committee members to act as returning officer.**

**CAMPBELL: So someone independent conducts the ballot?**

**PHILLIPS: Yes.**

**CAMPBELL: Are all these members resident in South Australia?**

**PHILLIPS: No, they're residents of around Australia.**

**CAMPBELL: So of the twelve people who are on the committee of management, how many reside in South Australia?**

**PHILLIPS: Ah, I think two. We've got people in Western Australia, South Australia, Tasmania, Victoria, Northern Territory, Queensland, and New South Wales.**

**CAMPBELL: How do you conduct your meetings?**

**PHILLIPS: Mostly by phone. Phone hookup.**

**CAMPBELL:** Mostly by phone hookup. How are you appointed?

**PHILLIPS:** By the committee.

**CAMPBELL:** By the committee of management? Are you appointed on an annual basis, three yearly basis?

**PHILLIPS:** Oh, annual.

**CAMPBELL:** Annual?

**PHILLIPS:** Yes.

**CAMPBELL:** The submission that you have presented here this morning, how was that put together?

**PHILLIPS:** How was it put together? Oh, well, research, a number of us get together, talk about the issues, I'm the chief draftsman of it, we review it, we make alterations to it, and then bed it down.

**CAMPBELL:** Did you canvas the views of your two hundred members?

**PHILLIPS:**                   **We canvassed the views of the committee.**

**CAMPBELL:**               **And you didn't canvas the views of the two hundred members? You didn't seek their views?**

**PHILLIPS:**               **No.**

**CAMPBELL:**               **So this submission does not reflect the views of the membership of your organisation?**

**PHILLIPS:**               **It reflects the views and the consistent views of the Independent Contractors of Australia, which has a massive amount of information on the website, which has caused people – which has caused people to be attracted to join us, and they join us because they know the consistency of the views that we put, and the submission reflects the consistency of those views. You'll note in the submission a very long list of submissions that we have made to government inquiries over a considerable period of time. There is a consistent central thrust to all of those views that have been put, and the submission that you have received is consistent with that.**

**CAMPBELL:**               **Mr Phillips, that's not the question I asked you, with all due respect. I asked you whether or not you'd canvassed the membership -**

**PHILLIPS:**               **And I answered that question, Senator.**

**CAMPBELL: - of the organisation, and you said no.**

**PHILLIPS: I answered the question.**

**CAMPBELL: You said the committee of management put together the submission. Did the committee of management put the submission together, or did you put it together?**

**PHILLIPS: I've answered the question.**

**CAMPBELL: I'm sorry, Mr Phillips, you haven't answered the question.**

**PHILLIPS: No, I'll repeat the answer.**

**TROETH: Well, perhaps if Senator Campbell asks you the question again. Senator Campbell.**

**CAMPBELL: The question, Mr Phillips, is did you canvas the views of your two hundred paying members in respect of your submission, or did you write the submission on behalf of the organisation?**

**PHILLIPS: I've – now, it's the second time you've asked that question, and I will give you the answer again. We did not canvas**

**the views of the two hundred members. We did a round of research, we drafted it, that went to the committee, we discussed it, there were alterations made to it, we then finalised it, and submitted it.**

**CAMPBELL: When you say we drafted it, you mean you drafted it?**

**PHILLIPS: There always needs to be a drafts person, but that's always done in conjunction with some other people.**

**CAMPBELL: And that was signed off by the committee?**

**PHILLIPS: Yes.**

**CAMPBELL: Without reference back to the two hundred members?**

**PHILLIPS: Correct.**

**CAMPBELL: Well, how can you purport that that represents the views of Independent Contractors of Australia, if you haven't consulted them?**

**PHILLIPS: Well, I would have thought -**

**CAMPBELL: But you don't even know whether or not your**

**two hundred members are independent contractors.**

**PHILLIPS:** I would have thought, Senator, that the process that I have described is a fairly common process, that would go down in relation to submissions before you. There would be nothing unusual in the process that we've conducted in terms of putting together the submission to the process that would have applied to any other one who's put a submission to you.

**CAMPBELL:** Does your organisation have conferences?

**PHILLIPS:** Yes.

**CAMPBELL:** In which members attend?

**PHILLIPS:** Yes.

**CAMPBELL:** When – how often are these conferences held?

**PHILLIPS:** In the last two years, we've had two.

**CAMPBELL:** You've had two.

**PHILLIPS:** Yes.

**CAMPBELL:** And they have been what, to discuss the



**running of the organisation?**

**PHILLIPS:** Specifically to discuss the, ah, the Independent Contractors Bill, and the proposal of the Independent Contractors Act, and what that should do, um, with a range of speakers who come in, and we talk about the issues. And then of course we have an annual AGM.

**CAMPBELL:** Right. Could you present us with the agenda for those conferences?

**PHILLIPS:** Ah, you will find, I believe, the – I can, and you will find the details of the conferences on our website, I believe, full details.

**CAMPBELL:** Minutes of the conferences?

**PHILLIPS:** Mainly all of the, ah, papers put by the various people who attended and put their views.

**CAMPBELL:** Do you publish an annual report?

**PHILLIPS:** Yes, and that's publicly available on our website.

**CAMPBELL:** It's on the website, is it? What is the relationship, Mr Phillips, between the ICA and the IPA?

**PHILLIPS:**                   **None.**

**CAMPBELL:**               **There's no relationship at all?**

**PHILLIPS:**               **No, the connection -**

**TROETH:**               **Sorry, just for the Committee's benefit, the  
IPA?**

**CAMPBELL:**               **The Institute of Public Affairs.**

**TROETH:**               **Thank you, thanks.**

**PHILLIPS:**               **I am a independent contractor who does a  
range of work across a range of things. As I explained, I did my, um,  
last year I had income from twenty different sources, and part of my  
work that I do is work with the Institute of Public Affairs.**

**CAMPBELL:**               **So you do work directly for the Institute of  
Public Affairs?**

**PHILLIPS:**               **Yes.**

**CAMPBELL:**               **Right. Research work?**

**PHILLIPS:** Yes.

**CAMPBELL:** Rating?

**PHILLIPS:** Yes.

**CAMPBELL:** Does the ICA have any statutory requirement for a financial disclosure?

**PHILLIPS:** Could you say that again?

**CAMPBELL:** Does the ICA have any statutory requirement for financial disclosure?

**PHILLIPS:** Under the, um, ah, the provisions of the South Australian Incorporations Act, if you have a turnover exceeding a certain amount, it's several hundreds of thousands of dollars, you are required to submit an annual financial return to the, ah, appropriate authority in South Australia. We do not exceed that amount, and so therefore we are not required under the Act to submit a return.

**CAMPBELL:** Right. Mr Phillips, in the preamble to its recommendation, the ILO observes as follows: it says, "Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to

disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, and recognising that there is a role for international guidance to members in achieving this protection through national law and practice, and that such guidance should remain relevant over time, and further recognising that such protection should be accessible to all, particularly vulnerable workers, and should be based on law that is efficient, effective and comprehensive, with expeditious outcomes and that encourages voluntary compliance”, how can the ICA claim that the definition of differences between employees and independent contractors were found by the ILO to be clear and consistent across the globe?

PHILLIPS: In, ah, 2003, and I refer to this in our submission to you, the ILO had come to a conclusion, which is a one – the ILO operates on a cascading series of, of criteria. There’s a convention recommendation, a conclusion, and various other steps. Conclusion is a step towards achieving a recommendation or a convention, and the recommendation in 2006 was based on the conclusion of 2003. On page 7 of our submission to you, I refer to a key statement in the, um, 2003 conclusion, which reads *“Self employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship”*. It was that conclusion that set the stage for 2006.

They also refer in there to the, um, investigation that was then done by the secretariat of the ILO, which conducted in 2004 and made a report in early 2005 in preparation for the 2006 debate, issued a very lengthy report which involved at least half of the report, gave the results of the first ever international survey conducted of the definitions of the employment relationship used across the globe. In particular, the chief academic in charge of this is a – or he’s just retired, but is a – from South America, and he in particular was concerned that the differences between common law and Roman law based countries were quite substantial.

Now, they did a survey across – I think it was in the order of 78 or 80 countries, across a wide variety of legal jurisdictions, and that report said *‘We were surprised at the level of convergence between all of the jurisdictions on the definitional issues’*. What they found was that the countries or courts are consistently looking for is an individual in a dependent style relationship, and if they are in a dependent style relationship, that denotes employment. It was on the basis of that report that the entire discussion in 2006 continued, and the 2006 recommendation picked up from the 2005 report, and that is reflected right through the 2006 recommendation.

CAMPBELL: I put it to you, Mr Phillips, that if you look at the total contents of the ILO standards, that in fact you cannot draw the conclusion that you’ve drawn in that paragraph, by saying that it’s

**clear and consistent across the globe.**

**PHILLIPS:** Well, the 2005, um, report, quite clearly states that, and it was their surprise finding. It is, Senator, the only, the only investigation of such detail and of such scale that's ever been conducted on this issue.

**CAMPBELL: (ALP)** I have no further questions.

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**HUTCHINS: (ALP)** Thank you Madame Chair. Um, I know we've only got a few minutes left. I'm – thank you, Mr Phillips, for confirming what I thought, that you're not legally trained, you confirmed that to Senator Murray. Um, Madame Chair, as you are aware, I have a bit of background in this area, and I was disturbed at the areas in fact and law in your submission which I may have to correct either in a submission myself or make a speech in the Senate next week. It's similar to the courier and taxi truck one yesterday, Madame Chair, similar sloppy errors.

**Mr James Taylor. Do you know Mr James Taylor?**

**PHILLIPS:** Yes.

**HUTCHINS:** Is he a member of your executive?

**PHILLIPS:** Yes.

**HUTCHINS:** And he has – he told us he actually has one company employee, and three hundred lorry owner/drivers. And he’s eligible to be a member of your executive?

**PHILLIPS:** Ah, yes.

**HUTCHINS:** Because he’s an independent contractor.

**PHILLIPS:** Correct.

**HUTCHINS:** Okay. Now, as I said, I’ve seemed to – I’ve only got a few questions to ask. You don’t like this Bill at all, do you? In fact, you think this Bill is of work choices disaster proportions, don’t you?

**PHILLIPS:** And you’re quoting me from where?

**HUTCHINS:** I’m quoting you from a memo that you sent on the 18<sup>th</sup> of May, this year.

**PHILLIPS:** Ah, that was before the Bill had been seen, if I recall, and, um, I was expressing a private view in a confidential e-mail,

**I think that you'll have there? It's obviously been leaked to you.**

**HUTCHINS: It says confidential, yeah. Clearly not confidential enough for it to be leaked.**

**PHILLIPS: Well, you've got a copy of it.**

**HUTCHINS: So you don't hold that it's still of work choices disaster proportions?**

**PHILLIPS: No, now that we've got the detail and that we understand what this is, we have broad agreement with the thrust of it, and we have detailed in our submission the areas that we are – sorry.**

**TROETH: Senator Hutchins, would you be able to table that memo?**

**HUTCHINS: Oh yes, but I mean, I need to refer to it -**

**TROETH: Yes, I understand that.**

**HUTCHINS: Yes, I will table it.**

**TROETH: You're happy to table it after that. Committee agreed? Yes, Committee is agreed. Thank you, Mr Phillips.**



**HUTCHINS:** So you're satisfied that it's no longer bad drafting?

**PHILLIPS:** That memo, if I recall, was written before the Bill came into the House.

**HUTCHINS:** So you hadn't seen the Bill before that?

**PHILLIPS:** Oh, absolutely not.

**HUTCHINS:** You say here that it is becoming clear that the detail of the Bill, so that suggests that you had seen the Bill.

**PHILLIPS:** No, I hadn't seen the Bill.

**HUTCHINS:** So you are misleading your membership?

**PHILLIPS:** No.

**HUTCHINS:** Well, it seems to me -

**PHILLIPS:** No, that was a memo to the committee.

**HUTCHINS:** Well, misleading your committee, then.

**PHILLIPS:** No.

**TROETH: Is that the committee of your organisation?**

**PHILLIPS: Yes. It's an internal committee memo.**

**HUTCHINS: It's just that from your writing, it suggests you have seen the Bill, and you've told us you hadn't.**

**PHILLIPS: No, of course I hadn't seen the Bill.**

**HUTCHINS: No, but this says you have.**

**PHILLIPS: No, that was from our understanding of where it might have been heading.**

**HUTCHINS: So you don't think it's shaping up as a Trojan horse, anymore?**

**PHILLIPS: Ah, if there are amendments that we have suggested here, we are very happy with the Bill.**

**HUTCHINS: But up until that stage, the Bill you said you hadn't seen, that you sent out to your committee to query it -**

**PHILLIPS: When one – when one is engaged in lobbying for issues and positions, ah, you follow a sense of where the debate's going. And there will be periods in that lobbying where you sense that**

**the debate is heading in a direction that you are comfortable with, and there will be periods in which you sense that the debate is heading in areas that you are not comfortable with. And that is all part of the normal process of democracy, and the lobbying that we do and that any other organisation will do, then when you see the detail of a particular Bill come out, then you've got something that you can specifically deal with. Up until that point, you are dealing with a whole series of impressions.**

**HUTCHINS: Mmm, I find that – your statement a bit disingenuous, but..... Further in your, um, memo, you say “Even more, the excellent work Peter Costello has done over a long time to resolve independent contractor tax issues is at risk by a bad IC Act”. Do you still hold to that?**

**PHILLIPS: If the Act was bad, ah, and those sorts of things and tax issues would be at risk. But the Act is not shaping up like that. We've got a different situation now that we have the Bill before us. You would be aware, Senator, that I am not a shrinking violet in terms of my robustness in putting views. Um, I have a – I have a -**

**HUTCHINS: I just think you should be a bit more robust at being honest, that's all.**

**PHILLIPS: I have a union background, Senator, and, um, the putting of views in a robust and very strong manner is part of my**

personality, and I certainly don't resile from that. And I hope that those views are then judged on the quality of the view put within the terms of achieving good outcomes with public policy. And the process for getting there can be interesting on occasions.

HUTCHINS:                   **Just before – because I – we don't have a lot of time left, and you answer our questions, we don't -**

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HUTCHINS: (ALP)                   **So, just a final question, and you may not hold these views anymore. I'd be interested in where you think you've – the legislation you hadn't seen, that you're now comfortable with, that you have seen, that you told your membership you have seen -**

PHILLIPS:                   **No, I told the committee.**

HUTCHINS:                   **Where you – where you – your committee, oh, well, do you still hold the view that “Over a five year period we are likely to deeply regret the Independent Contract Act, given it's current framework. With a change of government the tool will have been created to do enormous harm. These perhaps are extreme thoughts, but after a working life studying the tactics of the union movement and fifteen years of lobbying as an independent contractor issues, all my experience tells me that everything is pointed in that direction”. Do you still hold that view?**

**PHILLIPS:** Ah, with the modifications to the Bill, no, and that's in the reference to the exclusion clauses, ah, we've been very upfront about that in particular, that the exclusion clauses in the Bill deconstruct the integrity of the Bill. This is about the protection of independent contractors and their right to be their own boss, it's not about the protection of some independent contractors and their right to be their own boss, this is a fundamental right for all Australians which must be protected.

**TROETH:** Alright, thank you, thank you Mr Phillips. It's 11 – 10:45 now, so the Committee will suspend for 15 minutes and resume at 11:00 am. We will have a short – we will have a short Committee meeting.

**ENDS**